

STATE OF MICHIGAN
IN THE SUPREME COURT

COALITION PROTECTING AUTO NO-
FAULT (CPAN),

Plaintiff-Appellant

v

Supreme Court No. 150001
Court of Appeals No. 314310

THE MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION (MCCA),

Defendant-Appellee.

BRAIN INJURY ASSOCIATION OF
MICHIGAN (BIAMI),

Plaintiff-Appellant,

v

THE MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION (MCCA),

Defendant-Appellee.

**INSURANCE INSTITUTE OF MICHIGAN'S AND MICHIGAN INSURANCE
COALITION'S AMICUS BRIEF IN SUPPORT OF THE MICHIGAN CATASTROPHIC
CLAIMS ASSOCIATION**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
STATEMENT OF INTEREST AND INTRODUCTION.....	1
STATEMENT OF QUESTIONS INVOLVED.....	3
STATEMENT OF FACTS	4
STANDARD OF REVIEW	4
LAW AND ANALYSIS	4
I. The Court of Appeals' Opinion Should be Affirmed Because the MCCA is Not a Public Body as Defined by FOIA and, Therefore, MCL 500.134 Merely Clarified That the MCCA Was Not Subject to FOIA and Did Not Amend FOIA	4
A. The scope of FOIA by definition does not include MCCA.....	4
B. The history and structure of FOIA and MCCA shows no intent for FOIA to apply to MCCA.....	6
C. The 1988 amendment to MCL 500.134 merely confirmed original intent.....	9
II. Plaintiffs' FOIA Request Should Be Recognized and Denied as An Inappropriate Attempt to Have the Judiciary Usurp the Insurance Commissioner's Function for Inappropriate Political Reasons	11
CONCLUSION AND RELIEF REQUESTED	18

INDEX OF AUTHORITIES

Cases

<i>Churella v Pioneer State Mut Ins Co,</i> 258 Mich 260; 671 NW2d 125 (2003).....	16
<i>Citizens for Better Care v Dep't of Public Health,</i> 51 Mich App 454; 251 NW2d 576 (1974).....	6
<i>Complete Auto & Truck Parts, Inc v Secretary of State,</i> 264 Mich App 655; 692 NW2d 847 (2004).....	4
<i>Detroit Edison Co v Janosz,</i> 350 Mich 606; 87 NW2d 126 (1957).....	10
<i>Driver v Nani,</i> 490 Mich 239; 802 NW2d 311 (2011).....	6
<i>Empire Iron Mining Partnership v Orhanen,</i> 455 Mich 410; 565 NW2d 844 (1997).....	5
<i>Evanston YMCA Camp v State Tax Comm'n,</i> 369 Mich 1; 118 NW2d 818 (1962).....	6
<i>Fowler v Board of Registration,</i> 374 Mich 254; 132 NW2d 82 (1965).....	10
<i>Griffith v State Farm Mut Auto Ins Co,</i> 472 Mich 521; 697 NW2d 895 (2005).....	4
<i>Haliw v Sterling Hts,</i> 471 Mich 700; 691 NW2d 753 (2005).....	7
<i>Herman v Berrien Co,</i> 481 Mich 352; 750 NW2d 570 (2008).....	7
<i>League Gen Ins Co v Catastrophic claims Ass'n,</i> 165 Mich App 278; 418 NW2d 708 (1987).....	9-11

<i>Rory v Continental Ins Co</i> , 4 73 Mich 457; 703 NW2d 23 (2005).....	14
<i>Smith v Elliard</i> , 110 Mich App 25; 312 NW2d 161 (1981).....	10
<i>Tolford v Church</i> , 66 Mich 431; 33 NW 913 (1887).....	13
<i>Walen v Michigan Dep't of Corrections</i> , 189 Mich app 373; 473 NW2d 722 (1991).....	4,6,7
<i>Wickens v Oakwood Healthcare Sys</i> , 465 Mich 53; 631 NW2d 686 (2001).....	4
<i>William's Delight Corp v Harris</i> , 87 Mich App 202; 273 NW2d 911 (1978).....	6

Constitutional Provisions and Public Acts

Const 1963, art 4 § 1	1
1976 PA 442	7
1988 PA 277	9,10
1988 PA 349	9,10
1996 PA 533	8
1997 PA 6	8

Statutes

MCL 8.3u.....	11
MCL 15.1 to 15.6.....	8
MCL 15.36 to 15.39.....	8

MCL 15.41	8
MCL 15.71 to 15.72	8
MCL 15.231	4
MCL 15.231(2)	8
MCL 15.232(c) and (d)	<i>Passim</i>
MCL 15.233	4
MCL 15.233(1)	6
MCL 15.243	9
MCL 15.245	4,7
MCL 24.201	7
MCL 24.221	4
MCL 24.222	4
MCL 24.223	4
MCL 500.134	<i>Passim</i>
MCL 500.210	13
MCL 500.438(2)	13,16
MCL 500.3104	8,9,12
MCL 500.3104(1)	7
MCL 500.3104(13)	1
MCL 500.3104(21)	<i>Passim</i>

MCL 500.3104(22)	13
MCL 500.3104(23)	13

Miscellaneous

HB 4427	16,17
http://www.michigancatastrophic.com	13-15
Mich Admin Code R 500.993(2).	13
Mich Admin Code R 500.1207(4).	13
Mich Admin Code R 500.1501	13
Mich Admin Code R 500.1505(4)	13
Senate Legislative Analysis, SB 707, May 16, 1988	11
Senate Legislative Analysis, SB 707, June 8, 1988	11

Statement of Interest and Introduction

This action involves the attempt of two private organizations (one a member of the other) to use the courts to circumvent legislatively established policy and usurp the Insurance Commissioner's (Commissioner) authority to review and regulate MCCA's insurance filings. *Amici* oppose this attempt. *Amici*, the Michigan Insurance Coalition and the Insurance Institute of Michigan ("MIC" and "IIM") are state property-casualty trade associations, based in Michigan, representing individual insurers who write the vast majority of the automobile insurance issued in the State of Michigan. *Amici* offer a broader perspective on the effect this decision will have on the interests of the insurance industry statewide as well as on the public and policyholders. Particularly reprehensible to members of *amici* is any attempted politicization by plaintiffs of financial calculations of reserves that could expose insurers to payment if MCCA does not meet its obligations. MCCA makes annual filings of pertinent financial information with the same information specified by Insurance Commissioners appointed by Governors of both political parties.¹ The filings are available to plaintiffs, so they have available financial information that Insurance Commissioners determine is pertinent. Information beyond that is not pertinent to a legitimate inquiry or Insurance Commissioners would already ask for it.

This Court asked the parties to address only whether MCL 500.134 violates Const 1963, art 4, § 25 by creating an exemption to the Freedom of Information Act (FOIA) without reenacting and republishing the sections of FOIA that are altered and amended. *Amici* respectfully submit that the issue as stated presumes that there has been an alteration to FOIA.

¹ At the time the suit was filed and the judgment appealed from entered, the oversight was by the Insurance Commissioner. Thereafter, Executive Order 2013-1 (January 16, 2013) redesignated the Insurance Commissioner as the Director of the Department of Insurance and Financial Services, and transferred functions to the Director. MCLA 500.3104 (13), (21), (22) and (23) still refer to the Commissioner. That designation is continued here and throughout this Brief even though the official with the functions of the Insurance Commissioner is now the Director of the Department of Insurance and Financial Services. There has been no change of authority or oversight of MCCA in Executive Order 2013-1, which now has the Director as the Board Member referred to in MCL 500.3104(13).

Under FOIA's own definitions, the MCCA has never been a public body subject to disclosure, and the 1988 amendment to MCL 500.134 merely clarified this. Thus, the Court of Appeals opinion should be affirmed, or alternatively leave denied, on the basis that the Court of Appeals reached the right result. Plaintiffs should not be permitted to use the courts to perform an end run around both the Insurance Commissioner's function of specifying what is and is not pertinent, nor, the Legislature's proclamation, both in FOIA and the no-fault act, that the MCCA is a private entity rather than a public body, and its records are not subject to disclosure. Plaintiffs' request is merely a political ploy lacking merit in the grounds presented.

Statement of Questions Involved

- I. Should the Court of Appeals Opinion be Affirmed Because the MCCA is Not a Public Body as Defined by FOIA and, therefore, MCL 500.134 Merely Clarified that the MCCA was not Subject to FOIA and did not Amend FOIA?**

Amici answer "Yes".

- II. Should Plaintiffs' FOIA Request be Recognized and Denied Since an Inappropriate Attempt to have the Judiciary Supplant the Oversight Function of the Insurance Commissioner?**

Amici answer "Yes".

Facts:

IIM and MIC adopt the facts as stated in the MCCA's Brief. Most important to emphasize are these: Neither plaintiff claimed MCCA assessments are excessive, unfairly discriminatory, or unreasonable.² Neither plaintiff claimed any fraud, misuse of funds or similar wrongdoing by MCCA.³

Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001). Issues of statutory interpretation are reviewed de novo. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). Constitutional issues are reviewed de novo. *Complete Auto & Truck Parts, Inc v Secretary of State*, 264 Mich App 655, 659; 692 NW2d 847 (2004).

Law and Analysis:

I. The Court of Appeals' Opinion Should be Affirmed Because the MCCA is Not a Public Body as Defined by FOIA and, Therefore, MCL 500.134 Merely Clarified that the MCCA Was Not Subject to FOIA and Did Not Amend FOIA.

A. The scope of FOIA by definition does not include MCCA.

When the Legislature enacted FOIA in 1976,⁴ it created a dichotomy between "persons," which broadly includes an "association" on the one hand, and a "public body" on the other hand. Persons may request records of a public body. A public body must produce them. MCL 15.233.⁵ The definitions of a "person" and a "public body" in MCL 15.232(c) and (d) dispel

² CPAN First Amended Complaint, para 34; BIAMI Complaint para 30.

³ CPAN First Amended Complaint, para 67; BIAMI para 60.

⁴ Prior to the enactment of FOIA, MCL 15.231, *et seq.*, disclosure requirements were contained in the Administrative Procedures Act, sections MCL 24.221 through MCL 24.223. MCL 15.245 repealed these provisions. See *Walen v Michigan Dep't of Corrections*, 189 Mich App 373, 376; 473 NW2d 722 (1991), rev'd 443 Mich 240 (1993).

⁵ MCL 15.233 provides in relevant part:

(1) . . . a person has a right to inspect, copy, or receive copies of the

most of the myths of plaintiffs. A “person” includes an association by definition. MCL 15.232(c).⁶ A “public body” is never defined to include a “person” or an “association.” See MCL 15.232(d).⁷

The notion advanced by plaintiffs that the catchall “public body” in MCL 15.232(d)(iv) includes an “association” such as MCCA is incorrect for two main reasons. One is that the Legislature did not say “any other *person*” or “any other body *or person*” in MCL 15.232(d)(iv) as would be required to bridge the dichotomy it created between a “person” entitled to records and a “public body” obliged to produce records. When interpreting statutory provisions, it is not the province of the judiciary to insert words that the Legislature did not see fit to include. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997).

requested public record of the public body. . .

* * *

(3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. . . .

⁶ “Person” means an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. . . . [MCL 15.232(c).]

⁷ (d) “Public body” means any of the following:

- (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
- (ii) An agency, board, commission, or council in the legislative branch of the state government.
- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.
- (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [MCL 15.232(d).]

The second reason is that it is incorrect to treat associations as being included within the more general “any other body” in MCL 15.232(d)(iv). Associations are specifically a “person” in MCL 15.232(c), along with other individuals and entities. The specifics in that definition of “person” are not within the more general “any other body” for the precise reason this Court identified in *Evanston YMCA Camp v State Tax Comm’n*, 369 Mich 1, 8; 118 NW2d 818 (1962):

When we construe statutory language containing both specific and general provisions, we adopt the rule set forth in 50 Am Jur, Statutes, § 367, p 371:

“Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and *the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision.*” [Emphasis added].]

Accord, *William’s Delight Corp v Harris*, 87 Mich App 202, 208; 273 NW2d 911 (1978).

Thus, an association such as MCCA is a “person” entitled to seek records of a public body, but it is not a “public body” that is subject to FOIA.⁸ Compare MCL 15.232(c) with MCL 15.232(d) and MCL 15.233(1). Not only do the statutory definitions show error to subject MCCA to FOIA, but so does the history.

B. The history and structure of FOIA and MCCA shows no intent for FOIA to apply to MCCA.

FOIA was adopted in 1976. A mere two years later when MCCA was created, the Legislature thus had the recently enacted FOIA provisions differentiating “association,” defined as a “person” on the one hand, and “public body” on the other. See *Driver v Nani*, 490 Mich 239, 262 n 74; 802 NW2d 311 (2011), citing *Walen v Dep’t of Corrections*, 443 Mich 240, 248; 505 NW2d 519, 522 (1993) for the proposition that, “It is a well-known principle that the

⁸ Cf. *Citizens for Better Care v Dep’t of Public Health*, 51 Mich App 454, 461-462; 215 NW2d 576 (1974) (construing provisions of FOIA as it existed under the Administrative Procedures Act and concluding that an organization of citizens was properly defined as “a person” with standing to seek public records).

Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."

Thus, if the Legislature actually intended to make MCCA subject to FOIA, it could easily have done so. The Legislature could have made MCCA subject to FOIA by calling it a public body in the executive branch of government, and nailing down applicability under MCL 15.232(d)(i). Instead, it went the other direction and carefully chose to *not* call MCCA a "public body" in MCL 500.3104(1), but rather stated that "an unincorporated, nonprofit *association*" was created (emphasis added). At that time an association was a person for FOIA, but neither an association nor a person were defined as public bodies under FOIA. Thus, from the outset, MCCA was dovetailed for FOIA purposes as an association "person" not subject to FOIA records production instead of being a "public body" subject to FOIA production.

The statutory structure, legislative analysis, and stated public purpose of FOIA further demonstrate that FOIA never included MCCA as an entity subject to disclosure. In its original form, FOIA was part of the Administrative Procedures Act (APA), MCL 24.201, *et seq.*, which pertained solely to the "effect, processing, promulgation, publication, and inspection of *state agency rules*." 1969 PA 306, Preamble (emphasis added). 1976 PA 442 repealed the FOIA provisions of the APA and enacted FOIA as a stand-alone act. See MCL 15.245; *Walen v Dep't of Corrections*, 189 Mich App 373, 376; 473 NW2d 722 (1991), *rev'd on other grounds* 443 Mich 240 (1993). When FOIA was enacted as a stand-alone act in 1976, its intent to apply to governmental entities did not change. The Legislature placed it in chapter 15 pertaining to "Public Officers and Employees." When interpreting a statute, courts must consider its structure and placement within an act. *Herman v Berrien Co*, 480 Mich 352, 366; 750 NW2d 570 (2008). Cf. *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). Other acts included in this

chapter make clear that the focus was on governmental entities, and MCCA was not intended to be included.⁹ FOIA's expressly stated public policy demonstrates that it was intended to make government affairs, not the affairs of private entities, available to the public:

It is the public policy of this state that all persons . . . are entitled to full and complete information regarding the *affairs of government and the official acts of those who represent them as public officials and public employees*, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2) (emphasis added).]¹⁰

Legislative history and analysis further establishes that the MCCA is not a public body under FOIA's "catch-all" provision because it is not funded by or through state or local authority. House Legislative Analysis, HB 4007 Substitute (H-5), December 4, 2002, states, "Since the MCCA is a private, non-profit entity, the bill would have no fiscal impact on the State or on local units of government." Other legislative analyses additionally state that the bills would have no fiscal impact on the State or on local units of government.¹¹ MCCA's obligations are not guaranteed by the state's full faith and credit. MCCA is not subject to FOIA. It never was intended to be.

⁹ See for example, Bonds of State Officers and Employees, MCL 15.1 to MCL 15.6, Official Oaths and Bonds of State Officers, MCL 15.36 to MCL 15.39, Bond of Auditor General and Commissioner of State Land Office, MCL 15.41, Bond of Secretary of State, Deputy Secretary of State, and Governor's Secretary and Clerk, MCL 15.51, Cost and Filing of Bonds, MCL 15.71 to MCL 15.72, etcetera.

¹⁰ For a brief period, the emphasized portion of the statute was replaced with "governmental decision-making." 1996 PA 553. However, the original language replaced "governmental decision-making" two months later. 1997 PA 6.

¹¹ See Exhibit 1: House Legislative Analysis, HB 4007 Substitute (H-5), December 4, 2002 (pertaining to MCL 500.3104); House Legislative Analysis, HB 4007 as Introduced, March 19, 2002 (pertaining to MCL 500.3104); House Legislative Analysis, HB 4007 as enrolled, January 8, 2003 (pertaining to MCL 500.3104); Senate Legislative Analysis, SB 199, February 13, 2001 (pertaining to MCL 500.3104); Senate Legislative Analysis, SB 199, February 14, 2001 (pertaining to MCL 500.3104); Senate Legislative Analysis, SB 199, February 21, 2001 (pertaining to MCL 500.3104).

C. The 1988 amendment to MCL 500.134 merely confirmed original intent.

A decade after MCCA creation, and in response to unsettling case law on APA applicability to MCCA, 1988 PA 349 was enacted to clarify the meaning of MCL 500.3104. In response to the Court of Appeals decision in *League Gen Ins Co v Catastrophic Claims Ass'n*, 165 Mich App 278, 284; 418 NW2d 708 (1987), the Legislature amended the definition of "agency" under the APA to explicitly exclude "associations of insurers created under the insurance code." 1988 PA 277. In addition, the Legislature amended MCL 500.134 by 1988 PA 349 to declare with unmistakable clarity that the MCCA, as well as six other insurance associations and facilities, were not state agencies:

(3) An association or facility or the board of directors of the association or facility is not a state agency and the money of an association or facility is not state money.

* * *

(6) As used in this section, "association or facility" means an association of insurers created under this act and any other association or facility formed under this act as a nonprofit organization of insurer members, including, but not limited to, the following:

* * *

(c) The *catastrophic claims association created under Chapter 31*. [MCL 500.134(6)(c) (Emphasis added).]

The Legislature clarified the original intent to keep MCCA out of FOIA when it specifically described and exempted from disclosure by statute the records of seven associations such as the MCCA¹²:

A record of [the catastrophic claims association] shall be exempted from disclosure pursuant to section 13 of the freedom of information act . . . being section 15.243 . . . [MCL 500.134(4), (6)(c).]

¹² The other designated associations exempted are the Michigan worker's compensation placement facility; the Michigan basic property insurance association; the Michigan automobile insurance placement facility; the Michigan life and health insurance guaranty association; the property and casualty guaranty association; and, the assigned claims facility.

In addition to legislative attention and clarification, this Court granted leave to appeal to address whether MCCA was public or private. In doing so it directed the parties to address whether the MCCA was a state agency *before* the passage of 1988 PA 277. See *League Gen Ins Co v Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 342-343; 458 NW2d 632 (1990). This Court squarely held that MCCA was not a state agency: "Taken as a whole, the characteristics of the MCCA lead us to recognize it as a private *association*." *Id.* at 350, emphasis added. Thus, this Court recognized that the MCCA was not a state or governmental entity even before the passage of 1988 PA 277.

With the timing and confusion from the *League General* case law in the decade after MCCA was created, the legislation was clarification of original intent in light of the context. *Cf. Fowler v Board of Registration*, 374 Mich 254, 257; 132 NW2d 82 (1965) (courts determine intent by considering amendatory legislation in context of related legislation); *Smith v Eliard*, 110 Mich App 25, 31; 312 NW2d 161 (1981) ("an amended act is to be read in light of any case law promoting the amendment."); *Detroit Edison Co v Janosz*, 350 Mich 606, 613-614; 87 NW2d 126 (1957) (a clarifying amendment following confusion in case law is regarded as reflecting original intent).

The Legislature's intent to clarify was reflected in both the compiler's note as well as legislative analysis. The Compiler's notes to the statute stated:

The amendment to [Section 2 of 1988 PA 349] is intended to codify, approve, and validate the actions and long-standing practices taken by the associations and facilities mentioned in this amendatory act *retroactively to the time of their original creation*. It is the intent of this amendatory act to rectify the misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in *League General Insurance Company v Catastrophic Claims Association* . . . with respect to rule promulgation requirements on the catastrophic claims association as a state agency, and to further assure that *the associations and facilities mentioned in this amendatory act, and their respective*

boards of directors, shall not hereafter be treated as a state agency or public body." [Emphasis added].

Both Senate Legislative Analysis, SB 707, May 16, 1988, and Senate Legislative Analysis, SB 707, June 8, 1988,¹³ recognized the uncertainty of the status of associations and facilities, and the need to confirm their status as nongovernmental entities:

The League General litigation has created uncertainty regarding the status of the associations and facilities named in the bill, and the Court of Appeals' reasoning in regard to the Catastrophic Claims Association could be applied to these other entities as well. . . . In order to ensure that they continue to provide the coverage and protection to the public for which they were created, their status as nongovernmental entities should be confirmed.

Under settled rules of statutory construction, an amendment that does not change the meaning of a statute is merely a continuation of that statute, not a new enactment:

The provisions of any law or statute which is . . . amended . . . so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. [MCL 8.3u.]

Therefore, because FOIA never required disclosure by the MCCA, the amendment of MCL 500.134, which clarified that the MCCA was not a public body subject to disclosure under FOIA, was not a new enactment requiring republication of FOIA.

II. Plaintiffs' FOIA Request Should Be Recognized and Denied as An Inappropriate Attempt to Have the Judiciary Usurp the Insurance Commissioner's Function for Inappropriate Political Reasons.

Particularly reprehensible to members of *amici* is any attempted politicization by plaintiffs of financial calculations of reserves that could expose insurers to payment if MCCA does not meet its obligations. Reporting of pertinent financial information has long been at the behest of the Insurance Commissioner with standard reporting that is not dependent on the political party of the Governor. The Commissioner has an interest because insurers have the

¹³ See Exhibit 2.

obligation to pay claimants even if the MCCA is inadequately funded. The State does not guarantee MCCA's obligations.

Already, for the past 12 years, the amount per occurrence paid on each claim by insurers before MCCA reimbursement has statutorily increased either annually or biennially. MCL 500.3104. Currently, an insurer must pay more than half a million dollars per claim before MCCA reimbursement is available. The tacit premise of plaintiffs' ill logic is a right to supplant the Insurance Commissioner's oversight, with a rationale that would next target insurers.

In fact, plaintiffs have already begun using the instant suit to do so. As noted in their request for production and recounted in their Court of Appeals brief, plaintiffs have requested "The Annual Assessment Reports of the 10 largest Michigan auto insurance companies by premium volume. . . ."

MCCA has oversight, both internally and by the Insurance Commissioner. MCCA's 2014 Annual Report to the Director of Department of Insurance and Financial Services (DIFS) demonstrates the level of MCCA oversight, including independent review and audit:

MCCA Oversight

- The MCCA files annual financial statements with the Department of Insurance and Financial Services (DIFS)
- An independent auditor audits the MCCA's financial statements on an annual basis
- DIFS conducts financial audits of the MCCA every five years, most recently for the period July 1, 2006 to June 30, 2010.
- DIFS engages an independent actuary to review the work of MCCA's actuaries and issues [sic] a report
- DIFS has the right to examine any and all of the MCCA's operations and the Director and/or his designated representative attends all Board meetings
- The MCCA completes an Annual Financial Reporting Model Audit Regulation compliance audit on an annual basis which reviews internal financial controls and files a report of internal controls with DIFS

- MCCA engages an independent actuary to estimate the sufficiency of reserves
- The MCCA Actuarial Committee, comprised of eight credentialed actuaries, reviews the report and recommendation by the independent actuary
- The MCCA has implemented a Premium Audit Program to audit and verify assessable exposure information submitted by member companies
- The MCCA has retained an investment consultant to review the economic assumptions used by the MCCA independent actuary on an annual basis¹⁴

Administrative Oversight

MCCA financial affairs are regulated with reporting to the Commissioner, the same as a member insurer. MCL 500.3104(21). This is why there is an MCCA “annual statement” on the exact same form as is filed by an insurer. By statute, an “annual statement” includes “important elements” to the Commissioner. MCL 500.438(2). The Legislature has also delegated to the Commissioner the authority to promulgate rules to enforce the state’s insurance laws. MCL 500.210. And the Commissioner has instituted rules related to financial reporting requirements under the essential insurance act.¹⁵ Mich. Admin Code, R 500.1501, *et seq.* Of particular import is the administrative rule defining sound actuarial principles. Mich. Admin Code, R 500.1505(4). See also Mich. Admin Code, R 500.1207(4) pertaining to sound actuarial principles regarding casualty insurance. Annual statements of insurers have been required for over a century. See *Tolford v Church*, 66 Mich 431, 434; 33 NW 913 (1887). A succession of

¹⁴ <http://www.michigancatastrophic.com/LinkClick.aspx?fileticket=fPFOAnV9prA%3d&tabid=4691>.

¹⁵ These rules were promulgated in 1981 and 1980 respectively. They have been followed by commissioners appointed by different political party governors Milliken, Blanchard, Engler, Granholm, and Snyder. Financial information with “*any and all* important elements” (emphasis added) has been expressly delegated to the Commissioner to seek and obtain in insurer annual statements pursuant to MCL 500.438(2). Rules as to the “statement of opinion on the adequacy of reserves” for insurers annual statements (and made applicable to MCCA by MCL 500.3104(21)) are seen in Mich Admin Code R 500.993(2), adopted in 2006 during former Governor Granholm’s administration and continued to date without change during Governor Snyder’s administration.

commissioners (appointed by governors of both political parties), have specified the same financial information for annual statements. If an Insurance Commissioner determined that more reporting is required, MCL 500.3104 (21) and (23) are authority for such oversight.

It is not for Courts to usurp the role of an Insurance Commissioner. In *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), this Court noted that the Legislature had explicitly assigned a task (there, insurance policy form review and approval) to the Executive Branch's Commissioner rather than the judiciary. It recognized that the judiciary has a very limited scope of review concerning the Commissioner's decisions. *Id.* at 475-476. Because the *Rory* plaintiffs had not challenged the Commissioner's decision, much less shown that the decision was arbitrary, capricious, or a clear abuse of discretion, this Court held that courts were not free to supplant the jurisdiction of the Commissioner and make the determination de novo. *Id.* at 476.

Here, the MCCA's annual reports, the most recent independent audit that was performed, and the most recent audit conducted by the Commissioner are available on the MCCA's website for all to see. <http://www.michigancatastrophic.com>. The Commissioner's review entailed actuarial testing of the MCCA's reserves, by an independent actuary. The amounts met the requirements of the insurance laws of Michigan. They were computed in accordance with accepted loss reserve standards. They contained reasonable provisions for unpaid loss and LAE (loss adjustment expense) obligations. *Id.*

Plaintiffs already have access to this publicly available important information. Information already available on the MCCA's website, <http://www.michigancatastrophic.com>, includes (a) the history of rate assessments since 1978;¹⁶ (b) the retention level schedule since

¹⁶ See Exhibit B to *Amici's* amicus brief in the Court of Appeals; <http://www.michigancatastrophic.com/ConsumerInformation/HistoricAssessmentData/tabid/2939/Default.aspx>.

retention levels were first required;¹⁷ (c) the number of reported claims (31,846), open claims (14,938), and total payments made (\$11,934,249,148) from July 1978 to June 2014;¹⁸ and, (d) a breakdown of these numbers by showing the number of claimants for five different types of catastrophic injury, the amount of payments each year since 1981, the ages of the claimants at the time of occurrence, the loss payment summary by category, and a comparison of motorcycle claims.¹⁹

Moreover, Plaintiffs have access to required financial filings. The multi-page 2014 Annual Statement of the MCCA to the Insurance Department of the State of Michigan shows financial details including assets, liabilities, income, cash flow, underwriting and investments, five-year historical data, a summary investment schedule, and a breakdown of those investments.²⁰ Independent audit reports of these annual statements are performed as well as financial examinations by the Commissioner.²¹ The website also contains the MCCA's annual statements, summaries of annual statements, and independent auditor reports for the years 2012 and 2013.²² This information, which is available to anyone, belies any insinuation that the MCCA has omitted a disclosure or there has been dereliction of duty by Insurance Commissioners.

¹⁷ See Exhibit C to *Amici's* amicus brief in the Court of Appeals; <http://www.michigancatastrophic.com/ConsumerInformation/HistoricandFutureRetentions/tabid/2942/Default.aspx>.

¹⁸ See Exhibit D to *Amici's* amicus brief in the Court of Appeals; <http://www.michigancatastrophic.com/ConsumerInformation/ClaimStatistics/tabid/2943/Default.aspx>.

¹⁹ See Exhibit E to *Amici's* amicus brief in the Court of Appeals; <http://www.michigancatastrophic.com/LinkClick.aspx?fileticket=fPFOAnV9prA%3d&tabid=4691>.

²⁰ See Exhibit F to *Amici's* amicus brief in the Court of Appeals for the 2012 annual statement; <http://www.michigancatastrophic.com/LinkClick.aspx?fileticket=%2fS5H7wZ3C5Y%3d&tabid=2935>.

²¹ See Exhibit G and H to *Amici's* amicus brief in the Court of Appeals; See, also <http://www.michigancatastrophic.com/LinkClick.aspx?fileticket=Ca9OtIWytFw%3d&tabid=2936>, and <http://www.michigancatastrophic.com/LinkClick.aspx?fileticket=DxvIvcgghZQ%3d&tabid=2937>.

²² For annual statements and summaries, see <http://www.michigancatastrophic.com/FinancialReports/AnnualStatements/tabid/2935/Default.aspx>; For independent auditor reports, see <http://www.michigancatastrophic.com/FinancialReports/IndependentAuditorReports/tabid/2936/Default.aspx>.

If plaintiffs can force MCCA to respond to fishing expedition document requests despite the Legislature's definition of MCCA as a person and association and not a public body, and the Legislature's additional clarification that MCCA records are exempt from FOIA requests, then under plaintiffs' logic, every policyholder has that right. Indeed, anyone with idle curiosity would have the right because FOIA is not constrained by discovery abuse rules of litigation. If FOIA applies as plaintiffs urge, then MCCA as well as potentially auto insurers can be bogged down with like requests. Responding to these requests would add substantial cost to an already overburdened no-fault system. All one needs to do is consider what the costs would be in the instant suit of combing through files back to 1978 to compile the individualized data requested for the 31,846 reported claims and 14,938 open claims.

With the admissions by plaintiffs that they cannot say assessments of MCCA are unreasonable, and have no evidence of fraud or similar wrongdoing by MCCA, plaintiffs' attenuated interest and claimed justification are not reasons to judicially re-write FOIA in light of the most closely analogous case, one involving rights of a mutual policyholder. Plaintiffs would have no right to intrude on the business judgment of the directors of even a mutual insurer. *Cf Churella v Pioneer State Mut Ins Co*, 258 Mich 260, 269-270; 271-272; 671 NW2d 125 (2003).

If plaintiffs want to second guess standard financial reporting of "important elements," see MCL 500.438(2), bearing on MCCA "reporting, loss reserves, and investment requirements," MCL 500.3104(21), their recourse is the legislative branch of government. However, plaintiffs should well know that their recourse would be legislation, not a judicial foray into usurping the role of the Insurance Commissioner. In 2009, HB 4427 was introduced and supported by CPAN. It would have made the MCCA's records subject to FOIA. Even as originally introduced in the House of Representatives, the bill recognized that the MCCA was not a public body when it

stated, “*AS IF* THE BOARD WERE A PUBLIC BODY UNDER THE FREEDOM OF INFORMATION ACT.”²³ The substitute HB 4427 as passed by the House even more explicitly made clear that the MCCA was not a public body:

COMPLIANCE WITH SECTION 3104(25) OR (26) BY THE CATASTROPHIC CLAIMS ASSOCIATION CREATED UNDER CHAPTER 31 DOES NOT ALTER THE LEGAL STATUS OF THE ASSOCIATION UNDER THIS SUBSECTION AND THE ASSOCIATION SHALL NOT OTHERWISE BE TREATED AS A STATE AGENCY OR PUBLIC BODY.

Thus, even when the House of Representatives toyed with making the MCCA’s records subject to FOIA, it was not willing to make the MCCA a public body and accept the ramifications of doing so. Specifically, the state’s full faith and credit does not guarantee MCCA’s obligations. There are sound reasons why the Legislature has not made MCCA a state agency. The State of Michigan does not secure the liabilities of the MCCA through bonds or otherwise. There is no guaranty fund in back of the MCCA as there is for insurers. That means that member insurance companies, not the state, are ultimately responsible to pay claims – without limit – and then seek reimbursement from the MCCA depending on its collectability. The Legislature has no intent to assume the liability for the expanding burden of long term claims. The senate did not pass the bill, thus rejecting the attempt supported by CPAN to make the MCCA’s records subject to FOIA.

Nevertheless, CPAN now renews its quest judicially. Because the courts and Legislature have both decreed that the MCCA is not an agency and therefore not a public body, it is at best incongruous to strain this language to defy the acts to the contrary. This is especially true since the MCCA is a private non-profit organization. Plaintiffs are mistaken in saying that all insurers must join. Membership is voluntary in the sense that only insurers which provide no-fault coverage must be members, and insurers are not required to provide no-fault coverage.

²³ (emphasis added).

Conclusion and Relief Requested:

The MCCA has never been subject to FOIA. Plaintiffs admit they know of no unreasonableness of assessments or fraud. This is an invalid fishing expedition in the hopes of creating a politicized ploy. Regardless, the appeal lacks merit in the grounds presented because MCCA is an association that was created after FOIA, and FOIA never made such associations public bodies for FOIA. *Amici* respectfully request that this Court either deny leave to appeal.

Respectfully submitted,
WILLINGHAM & COTÉ, P.C.

Attorneys for *Amici Curiae* IIM and MIC

Dated: March 23, 2015

BY /s/ Kimberlee A. Hillock

Kimberlee A. Hillock (P65647)

John A. Yeager (P26756)

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EXHIBIT 1

CATASTROPHIC CLAIMS PREMIUM; REDUCE FOR HISTORIC VEHICLES



Telephone: (517) 373-8080
Facsimile: (517) 373-5874
www.house.state.mi.us/hfa

FISCAL ANALYSIS

Mitchell Bean, Director
124 N. Capitol Avenue
4-N HOB Lansing, MI

HOUSE BILL 4007 SUBSTITUTE (H-5)

Sponsor: Rep. Ron Jelinek

House Committee: Insurance and Financial Services

FLOOR ANALYSIS - 12/4/02

Analyst(s): Bob Schneider

SUMMARY

The bill reduces the premium paid by member insurers to the Michigan Catastrophic Claims Association for an insured "historic vehicle" – as defined in the bill. Member insurers would be charged by the MCCA a premium equal to 20% of the premium otherwise charged for each insured car and motorcycle. The bill would not affect the total premium imposed by the association on all insurers. However, it could affect the distribution of this premium across member insurers, with insurers that provide insurance for a relatively larger share of historic vehicles than the average insurer paying slightly less under the bill (and vice versa). Since the MCCA is a private, non-profit entity, the bill would have no fiscal impact on the State or on local units of government.

CATASTROPHIC CLAIMS PREMIUM; EXEMPT HISTORIC VEHICLES



Telephone: (517) 373-8080
Facsimile: (517) 373-5874
www.house.state.mi.us/hfa

FISCAL ANALYSIS

Mitchell Bean, Director
124 N. Capitol Avenue
4-N HOB Lansing, MI

HOUSE BILL 4007 AS INTRODUCED

Sponsor: Rep. Ron Jelinek

House Committee: Insurance and Financial Services

COMMITTEE ANALYSIS - 3/19/02

Analyst(s): Bob Schneider

SUMMARY

The bill provides that member insurers of the Michigan Catastrophic Claims Association not be charged a premium by the association for registered historic vehicles that are insured with member insurers. The bill would not affect the total premium imposed by the association on all insurers. However, it could affect the distribution of this premium across member insurers, with insurers that provide insurance for a relatively larger share of registered historic vehicles than the average insurer paying slightly less under the bill (and vice versa). The bill would have no fiscal impact on the State or on local units of government.

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House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

REDUCE MCCA PREMIUM FOR HISTORIC VEHICLES

House Bill 4007 as enrolled
Public Act 662 of 2002
Sponsor: Rep. Ron Jelinek

House Committee: Insurance and
Financial Services
Senate Committee: none

First Analysis (1-8-03)

THE APPARENT PROBLEM:

Under Michigan's no-fault auto insurance law, the personal injury protection (PIP) coverage of an auto policy pays unlimited medical, hospital, and rehabilitation expenses. In cases of serious injury, covered expenses include home health care, a per diem amount for hiring someone to help with household chores, home and car modifications, and up to three years of wage loss benefits. Because the medical and other expenses for a serious injury as a result of an auto accident can be quite expensive, insurance companies protect their financial stability by purchasing reinsurance. This enables an insurer to spread the risk among a larger group of insurers.

The Michigan Catastrophic Claims Association (MCCA) was created under the no-fault law to act as the reinsurer. All companies providing auto insurance in the state must be a member of the MCCA. Auto insurers must pay the first \$300,000 of a medical claim. (This statutory liability amount is currently set at \$300,000, but this amount will increase over the next decade until it reaches \$500,000.) An insurer can be reimbursed from the MCCA for a claim that exceeds the statutory limit. To fund the MCCA, an auto insurer pays an assessment for each vehicle insured under a no-fault policy. These assessments are passed on, in whole or in part, to policyholders as part of their auto insurance premium.

Reportedly, this year the assessment fee for each insured vehicle rose from about \$14.41 to around \$70. To those who own or collect antique vehicles, the increase in the MCCA assessment fee is considered to be an unwarranted hardship, especially considering that antique or classic cars are not used for routine transportation, but generally for

appearances in parades or classic car shows, and that collectors often own several of these cars. Because such vehicles are rarely driven or are driven many fewer miles than the typical family car, they are seldom (some believe never) involved in traffic accidents that result in injuries serious enough to require an insurer to exceed the statutory liability threshold. Some believe, therefore, that these vintage vehicles should only be assessed a fraction of the amount assessed for a regular car or motorcycle.

THE CONTENT OF THE BILL:

The bill would amend the Insurance Code to reduce the premium charged for historic vehicles for the Michigan Catastrophic Claims Association (MCCA). Under the bill, the premium charged for a historic vehicle would be 20 percent of the premium otherwise charged for each car and motorcycle. The definition for "car" would be rewritten to exclude a historic vehicle.

The term "historic vehicle" would be defined to refer to a vehicle that is a registered historic vehicle under the Michigan Vehicle Code (MCL 257.803a and 257.803p). [Note: According to the code (MCL 257.20a), such vehicles must over 25 years old and be owned solely as a collector's item and for participation in club activities, exhibitions, tours, parades, and similar uses. A historic vehicle cannot be used for general transportation, and some insurance companies restrict the car to being driven only 2,500 miles a year.]

The bill would take effect July 1, 2003.

MCL 500.3104

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal impact on state or local governments. (12-4-02)

ARGUMENTS:**For:**

Quite simply, owners of historic vehicles feel that they are paying a disproportionate share of the assessment passed on by insurers that is used to fund the Michigan Catastrophic Claims Association (MCCA). The fund is used to reimburse Michigan insurance companies for medical claims in excess of the statutory liability limit, currently set at \$300,000. Since the use and purpose of historic vehicles is restricted by law (e.g., they can be driven in parades, etc., but not for general transportation, they are typically a collector's item, or are a means of participation in club activities), they are rarely, if ever, involved in serious accidents. Reportedly, insurers of such vehicles have never needed to collect from the MCCA. When the annual per car assessment to fund the MCCA was under \$15, paying the same for a classic car as for the family van wasn't an issue. However, the per car assessment fee was raised this year to about \$70 a vehicle, with possible increases in the future. This increased fee can represent a substantial cost for a classic car owner, who typically owns more than one historic vehicle in addition to a vehicle that is used for general transportation.

Since historic vehicles are considered by some to represent a lesser risk of a catastrophic injury needing reimbursement from the MCCA fund, it is believed that a fairer solution would be to decrease the amount of the fee levied on these vehicles. The bill would reduce the MCCA assessment fee portion of an insurance premium for a historic vehicle to 20 percent of that assessed for a car or motorcycle. In this way, owners of historic vehicles would still be paying into the fund, but at a level that is more proportionate to the amount that such vehicles are actually in use.

[This amount was selected because the figure represents twenty percent of the mileage allowed annually on the typical car rental contract. Most car rental contracts only permit a vehicle to be driven 12,000 miles a year (mileage over this amount is subject to a per mile charge). Some insurance companies limit a historic vehicle to 2,500 miles a year, which is 20 percent of that allowed for rental cars.]

Against:

Several concerns have been raised about the bill:

- It could be viewed as being the beginning of a "slippery slope" of creating different risk categories. A similar argument could be made for owners of antique farm equipment, regular farm equipment that are used only a few months of the year, and commercial vehicles that are used on an irregular basis. Creating different risk categories would also create an administrative nightmare for insurance companies in trying to determine the appropriate category for a particular vehicle.
- Decreasing the premium for even one category of vehicles could result in an increase in the assessment that would have to be borne by owners of other vehicles.
- According to the commissioner of the Office of Financial and Insurance Services, the MCCA fund is the most volatile fund administered by the agency. Because a single accident can result in payouts of millions of dollars over the lifetime of a severely injured person (reportedly, one insurer is looking at a claim that may exceed 20 million over the injured person's lifetime), just one or two accidents more than what had been predicted for a particular type of vehicle can significantly impact the health and stability of the fund.
- Many factors, such as decreases in investment returns and the difficulties and uncertainties in predicting the risk of a catastrophic injury and the cost to treat the resulting injury (especially with ever-increasing medical and rehabilitation costs) already result in fluctuations of the annual assessment as the fund experiences deficits and surpluses. According to an OFIS analysis of an earlier version of the bill, dated 11-8-02, a measure – such as proposed by the bill – that would require the MCCA to predict risk for a particular type of vehicle, and calculate and prepare two separate calculations based upon loss experience for each specific type of vehicle, could result in even greater variances in the assessment fee from year to year. In addition, such fluctuations from year to year could lead to greater consumer dissatisfaction with the MCCA assessment.

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 199 (as introduced 2-13-01)
Sponsor: Senator Joanne G. Emmons
Committee: Financial Services

Date Completed: 2-13-01

CONTENT

The bill would amend Chapter 31 (Motor Vehicle Personal and Property Protection) of the Insurance Code to provide for increases in no-fault insurers' retention limit, beyond which the Michigan Catastrophic Claims Association (MCCA) provides indemnification. Under the bill, the MCCA would have to provide and each member would have to accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in the following amounts, for a motor vehicle accident policy issued or renewed during the following periods:

Amount	Period
\$250,000	Before July 1, 2002
\$300,000	July 1, 2002, to June 30, 2003
\$325,000	July 1, 2003, to June 30, 2004
\$350,000	July 1, 2004, to June 30, 2005
\$375,000	July 1, 2005, to June 30, 2006
\$400,000	July 1, 2006, to June 30, 2007
\$420,000	July 1, 2007, to June 30, 2008
\$440,000	July 1, 2008, to June 30, 2009
\$460,000	July 1, 2009, to June 30, 2010
\$480,000	July 1, 2010, to June 30, 2011
\$500,000	July 1, 2011, to June 30, 2013

Beginning July 1, 2013, the \$500,000 amount would have to be increased biennially on July 1 of the following odd-numbered year, by the lesser of 6% or the consumer price index, and rounded to the nearest \$5,000. The MCCA would have to calculate the biennial adjustment by January 1 of the year of its July 1 effective date.

Currently, each no-fault insurer must be a member of the MCCA. The MCCA must provide and each member must accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of \$250,000 in each occurrence. ("Ultimate loss" means the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses. An ultimate loss is incurred by the MCCA on the date that the loss occurs.)

The bill would take effect July 1, 2002.

MCL 500.3104
FISCAL IMPACT

Legislative Analyst: L. Arasim

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Tyszkiewicz

S0102\1s199sa

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
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Senate Bill 199 (as reported without amendment)
Sponsor: Senator Joanne G. Emmons
Committee: Financial Services

CONTENT

The bill would amend Chapter 31 (Motor Vehicle Personal and Property Protection) of the Insurance Code to provide for increases in no-fault insurers' retention limit, beyond which the Michigan Catastrophic Claims Association (MCCA) provides indemnification. Under the bill, the MCCA would have to provide and each member would have to accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in the following amounts, for a motor vehicle accident policy issued or renewed during the following periods:

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\$420,000	July 1, 2007, to June 30, 2008
\$440,000	July 1, 2008, to June 30, 2009
\$460,000	July 1, 2009, to June 30, 2010
\$480,000	July 1, 2010, to June 30, 2011
\$500,000	July 1, 2011, to June 30, 2013

Beginning July 1, 2013, the \$500,000 amount would have to be increased biennially on July 1 of the following odd-numbered year, by the lesser of 6% or the consumer price index, and rounded to the nearest \$5,000. The MCCA would have to calculate the biennial adjustment by January 1 of the year of its July 1 effective date.

Currently, each no-fault insurer must be a member of the MCCA. The MCCA must provide and each member must accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of \$250,000 in each occurrence.

The bill would take effect July 1, 2002.

MCL 500.3104

Legislative Analyst: L. Arasim

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Date Completed: 2-14-01

Fiscal Analyst: M. Tyszkiewicz

Senate Fiscal Agency
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Lansing, Michigan 48909-7536

SFA



BILL ANALYSIS

Telephone: (517) 373-5383
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Senate Bill 199 (as enrolled)
Sponsor: Senator Joanne G. Emmons
Committee: Financial Services

Date Completed: 2-21-01

RATIONALE

Because there is no limit on the amount of coverage for personal injuries under Michigan's no-fault automobile insurance system, the potential liability for this coverage is too large for many insurance companies to bear. In other types of insurance, when an insured risk represents a liability that is larger than an insurer can afford, the insurer shares the risk with other insurance companies through the purchase of reinsurance, in which the reinsurer agrees to share any losses with the reinsurer. The Michigan Catastrophic Claims Association (MCCA) was established in 1978 as an unincorporated, nonprofit association composed of companies writing auto insurance in the State. The MCCA acts as a reinsurer for these insurers by reimbursing an insurance company for the amount of personal injury protection (PIP) losses over \$250,000, which is referred to as a retention level. All auto insurance companies in the State are covered by the MCCA and pay an annual assessment for this coverage. The insurance companies may pass the assessment on to policyholders, either as a part of the PIP portion of a premium or as a separate charge. The \$250,000 retention level has not been adjusted since the MCCA was established in 1978. Some people believe that the level should be increased to reflect rising costs of medical and other covered services for catastrophic injuries.

CONTENT

The bill would amend Chapter 31 (Motor Vehicle Personal and Property Protection) of the Insurance Code to provide for increases in no-fault insurers' retention limit, beyond which the MCCA provides indemnification. Under the bill, the MCCA would have to provide and each member would have to accept indemnification

for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in the following amounts, for a motor vehicle accident policy issued or renewed during the following periods:

Amount	Period
\$250,000	Before July 1, 2002
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\$420,000	July 1, 2007, to June 30, 2008
\$440,000	July 1, 2008, to June 30, 2009
\$460,000	July 1, 2009, to June 30, 2010
\$480,000	July 1, 2010, to June 30, 2011
\$500,000	July 1, 2011, to June 30, 2013

Beginning July 1, 2013, the \$500,000 amount would have to be increased biennially on July 1 of the following odd-numbered year, by the lesser of 6% or the consumer price index, and rounded to the nearest \$5,000. The MCCA would have to calculate the biennial adjustment by January 1 of the year of its July 1 effective date.

Currently, each no-fault insurer must be a member of the MCCA. The MCCA must provide and each member must accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of \$250,000 in each occurrence. ("Ultimate loss" means the actual loss amounts that a member

is obligated to pay and that are paid or payable by the member, and do not include claim expenses. An ultimate loss is incurred by the MCCA on the date that the loss occurs.)

The bill would take effect July 1, 2002.

MCL 500.3104

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

To reflect the increasing costs of medical services, the bill would gradually raise the level at which the MCCA assumes responsibility for a personal injury claim against an auto insurance company. Consequently, the amount an individual auto insurer is responsible for covering also would gradually increase. By phasing in an increase in the \$250,000 retention level, the bill would enable insurance companies would be able to plan and budget for the increased risk on a long-term basis, which would allow them to be more stable financially. According to the Office of Financial and Insurance Services in the Department of Consumer and Industry Services, companies with large surpluses would be able to absorb larger amounts per loss than the present level of \$250,000. Because they would not have to purchase reinsurance to cover the higher liability, this could reduce their overall operating costs. Some companies that have smaller surpluses often purchase reinsurance to cover a portion of the losses that fall below \$250,000. For example, a company might cover \$100,000 of the liability and purchase reinsurance to cover the remaining \$150,000. Since the retention level would increase gradually, smaller insurance companies would be able to plan further in advance to purchase reinsurance coverage for losses that fell below the changing retention level.

Opposing Argument

All auto insurance companies in the State are covered by the MCCA and pay an annual assessment for this coverage, which they may pass on to policyholders. As the retention level increased, insurance companies could raise the PIP portion of a premium to reflect the higher level. This could result in higher insurance rates for consumers.

Response: It is not certain that rates would increase. A PIP premium could rise to reflect an increase in the amount of a claim that an individual auto insurer would be responsible for covering. The amount the MCCA assesses an auto insurer for coverage, however, could be lowered as the level at which the MCCA assumed responsibility for a catastrophic claim increased. Furthermore, the PIP portion of a premium is not a set assessment, so consumers could look for a policy from an insurance company that provided more competitive rates.

Opposing Argument

The frequency and cost of catastrophic injuries are difficult to predict. By gradually increasing the retention level, the bill would require insurance companies to accept a larger amount of risk for each catastrophic injury. This could place an insurer in financial jeopardy, if the insurer chose not to purchase reinsurance for this risk and several large catastrophic injuries occurred to its policyholders in a short period of time.

Legislative Analyst: L. Arasim

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Tyszkiewicz

A0102/s199a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

EXHIBIT 2

SFA**BILL ANALYSIS**

Senate Fiscal Agency

Lansing, Michigan 48909

(517) 373-5383

Senate Bill 707 (Substitute S-2 as reported)

Author: Senator Dick Posthumus

Committee: Commerce and Technology

Date Completed: 5-16-88

RATIONALE

In December 1987, the Michigan Court of Appeals ruled that the Catastrophic Claims Association (CCA) is a State agency and, as such, is bound by the rule-making requirements of the Administrative Procedures Act (APA). Accordingly, the Court held that the CCA's plan of operation had to be repromulgated as a rule to be effective (League General Insurance Company v Catastrophic Claims Association, 165 Mich App 278). Some people believe that the Court was wrong in applying the APA to the Association and that the Insurance Code should be amended to reverse this decision and preclude a similar ruling in relation to other insurance associations.

CONTENT

The bill would amend the Insurance Code to validate retroactively any plan of operation adopted by an association or facility created under the Code as a nonprofit organization of insurer members, and to validate any premium or assessment levied against an insurer member. The bill specifies that such an association or facility, or its board of directors, would not be a State agency, its money would not be State money, its records would be exempt from the Freedom of Information Act, and premiums or assessments it levied would not be a "burden or special burden" for purposes of the retaliatory tax or included in determining the aggregate amount a foreign insurer must pay under that tax. Organizations the bill would apply to are the Worker's Compensation Placement Facility, the Basic Property Insurance Association, the Catastrophic Claims Association, the Automobile Insurance Placement Facility, the Life and Health Insurance Guaranty Association, and the Property and Casualty Guaranty Association.

The bill also specifies that it is "intended to codify ... and validate the actions and long-standing practices taken by the associations and facilities ... retroactively; 'to rectify the misconstruction of the applicability of the Administrative Procedures Act ... by the Court of Appeals in League General Insurance Company v Catastrophic Claims Association'; and to assure that the associations and facilities mentioned in the bill, and their boards of directors, were not treated as a State Agency or public body.

MCL 500.134

BACKGROUND

The Court of Appeals in League General affirmed the trial court's order holding that the Catastrophic Claims Association "was a State agency under the Administrative

Procedures Act, that its plan of operation was null and void and of no effect because it was not properly promulgated under the APA, and that premium assessments charged member insurers under the plan of operation were unenforceable until [the CCA] adopted valid rules under the APA". The Court went on to say, "An examination of the CCA's character and relation to the state reveals that the association was created by statute, that the Commissioner of Insurance appoints the director and serves as ex officio member of the board of directors, and that the CCA levies mandatory assessments against its members and has the power to adopt rules and hear complaints ... Finally, the CCA's function reveals characteristics of a state agency as well."

As the Court of Appeals described it, the CCA is an unincorporated nonprofit association created under the Insurance Code to indemnify insurance companies for catastrophic claims or the ultimate loss sustained under personal protection insurance coverages in excess of \$250,000. Each insurer writing automobile no-fault insurance in Michigan must belong to the CCA, which is authorized to cover the expected cost of catastrophic claims and the CCA's expenses. The insurers may charge each policyholder directly for the CCA assessment.

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS**Supporting Argument**

The League General litigation has created uncertainty regarding the status of the associations and facilities named in the bill, and the Court of Appeal's reasoning in regard to the Catastrophic Claims Association could be applied to these other entities as well. Uncertainty about their status makes all of the associations and facilities vulnerable to members' refusing to participate if they become dissatisfied about some element of the operation. Unnecessary litigation, and being subjected to the APA's rule-making process, obviously would disrupt the functioning of these facilities. In order to ensure that they continue to provide the coverage and protection to the public for which they were created, their status as nongovernmental entities should be confirmed.

Supporting Argument

The bill would make it clear that payments made to the

OVER

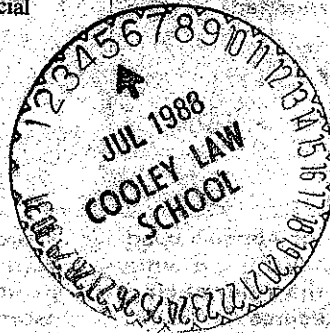
S.B. 707 (5-16-88)

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named facilities and associations would not be included when determining the retaliatory tax (which requires an out-of-state insurer to pay the same rate a Michigan-based insurer would have to pay in the foreign insurer's state). This issue was not directly addressed when the retaliatory tax provisions were revised by Public Act 261 of 1987.

Legislative Analyst: S. Margules
Fiscal Analyst: J. Schultz

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BILL ANALYSIS

Senate Fiscal Agency

Lansing, Michigan 48909

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Senate Bill 707 (Substitute S-2 as passed by the Senate)

Sponsor: Senator Dick Posthumus

Committee: Commerce and Technology

Date Completed: 6-8-88

RATIONALE

In December 1987, the Michigan Court of Appeals ruled that the Catastrophic Claims Association (CCA) is a State agency and, as such, is bound by the rule-making requirements of the Administrative Procedures Act (APA). Accordingly, the Court held that the CCA's plan of operation had to be repromulgated as a rule to be effective (*League General Insurance Company v Catastrophic Claims Association*, 165 Mich App 278). Some people believe that the Court was wrong in applying the APA to the Association and that the Insurance Code should be amended to reverse this decision and preclude a similar ruling in relation to other insurance associations.

CONTENT

The bill would amend the Insurance Code to validate retroactively any plan of operation adopted by an association or facility created under the Code as a nonprofit organization of insurer members, and to validate any premium or assessment levied against an insurer member. The bill specifies that such an association or facility, or its board of directors, would not be a State agency, its money would not be State money, its records would be exempt from the Freedom of Information Act. Premiums or assessments levied by an association or facility, or a premium or assessment of a similar association or facility formed under a law in force outside this State, would not be a "burden or special burden" for purposes of the retaliatory tax or included in determining the aggregate amount a foreign insurer must pay under that tax. Organizations the bill would apply to are the Worker's Compensation Placement Facility, the Basic Property Insurance Association, the Catastrophic Claims Association, the Automobile Insurance Placement Facility, the Life and Health Insurance Guaranty Association, and the Property and Casualty Guaranty Association.

The bill also specifies that it is "intended to codify...and validate the actions and long-standing practices taken by the associations and facilities...retroactively, 'to rectify the misconstruction of the applicability of the Administrative Procedures Act...by the Court of Appeals in *League General Insurance Company v Catastrophic Claims Association*'; and to assure that the associations and facilities mentioned in the bill, and their boards of directors, were not treated as a State Agency or public body.

MCL 500.134

BACKGROUND

The Court of Appeals in *League General* affirmed the trial court's order holding that the Catastrophic Claims Association "was a State agency under the Administrative Procedures Act, that its plan of operation was null and void and of no effect because it was not properly

promulgated under the APA, and that premium assessments charged member insurers under the plan of operation were unenforceable until [the CCA] adopted valid rules under the APA". The Court went on to say, "An examination of the CCA's character and relation to the state reveals that the association was created by statute, that the Commissioner of Insurance appoints the director and serves as ex officio member of the board of directors, and that the CCA levies mandatory assessments against its members and has the power to adopt rules and hear complaints... Finally, the CCA's function reveals characteristics of a state agency as well."

As the Court of Appeals described it, the CCA is an unincorporated nonprofit association created under the Insurance Code to indemnify insurance companies for catastrophic claims or the ultimate loss sustained under personal protection insurance coverages in excess of \$250,000. Each insurer writing automobile no-fault insurance in Michigan must belong to the CCA, which is authorized to cover the expected cost of catastrophic claims and the CCA's expenses. The insurers may charge each policyholder directly for the CCA assessment.

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS**Supporting Argument**

The *League General* litigation has created uncertainty regarding the status of the associations and facilities named in the bill, and the Court of Appeal's reasoning in regard to the Catastrophic Claims Association could be applied to these other entities as well. Uncertainty about their status makes all of the associations and facilities vulnerable to members' refusing to participate if they become dissatisfied about some element of the operation. Unnecessary litigation, and being subjected to the APA's rule-making process, obviously would disrupt the functioning of these facilities. In order to ensure that they continue to provide the coverage and protection to the public for which they were created, their status as nongovernmental entities should be confirmed.

Supporting Argument

The bill would make it clear that payments made to the named facilities and associations would not be included when determining the retaliatory tax (which requires an out-of-state insurer to pay the same rate a Michigan-based insurer would have to pay in the foreign insurer's state). This issue was not directly addressed when the retaliatory tax provisions were revised by Public Act 261 of 1987.

S.B. 707 (6-8-88)

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